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*Coke, the statute, wives and lovers: routes to a harsher interpretation of the Statute of Westminster II c. 34 on dower and adultery*

In the Statute of Westminster II (1285) c.34, it was enacted that a widow could lose her action of dower, and the possibility of claiming the usual proportion of her deceased husband's real property, if, while he was alive, she had left him for a lover, and the married couple had not been reconciled during the husband's life.<sup>1</sup> This new exception to the action of dower represented an important change in the balance between a widow and her husband's heir, or others with an interest in lands she might claim as her dower, and is therefore of great significance to the history of women, law and property in the common law world. The exception remained part of the law of England until dower itself was abolished in 1925,<sup>2</sup> but, although the early years of the exception have been explored,<sup>3</sup> its later history is less well known. As this paper will show, there was a slow and contested move away from the early literal and relatively 'widow-friendly' interpretation of c.34 to a purposive, more moralising and much more 'widow-unfriendly' view, influenced by the opinion of Sir Edward Coke (1552-1634), and encouraged by a number of other legal and social factors.

### **The change explained and illustrated**

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<sup>1</sup> *Statutes of the Realm* I, 87: *si sponte reliquerit virum suu[m] & abierit & moretur cum adultero suo, amittat imperpetuum accionem petendi dotum suam ... si super hoc convincetur ...* '[a wife proved to have left her husband of her own free will and to have gone to live with 'her adulterer' would lose her action to claim dower] – unless the husband had been reconciled with her and had allowed her to cohabit with him again, the reconciliation being voluntarily on his part and without ecclesiastical coercion.

<sup>2</sup> Administration of Estates Act 1925 s. 45 (c).

<sup>3</sup> P. Brand, "'Deserving' and 'undeserving' wives: earning and forfeiting dower in medieval England", *JLH*, 22 (2001), 1-20; G. Seabourne, 'Copulative complexities: the exception of adultery in medieval dower actions', in M. Dyson and D. Ibbetson (eds), *Law and Legal Process* (Cambridge, 2013, forthcoming).

The issue of interpretation which will be discussed is whether, in order to make out the c.34 exception and bar the widow from her dower action, the tenant (defendant) had to plead and show both that she had left her husband willingly and also that she had remained away, living with an adulterer, or whether it sufficed for the tenant to plead and show that the claimant had lived away in adultery, whatever might have been the circumstances of her departure.<sup>4</sup> It seems likely that women who left their husbands would often have ended up in adulterous relationships, because, unless she managed to obtain a full annulment (divorce *a vinculo matrimonii*), a woman who had left her husband would be unable to marry again, so that any sexual relationship which she formed during her husband's life would necessarily be adulterous. Given the disabilities associated with continued 'coverture', economic necessity as much as desire might prompt a woman to seek a male protector.<sup>5</sup> If adultery was a likely outcome, sooner or later, after a woman left her husband, the interpretation of c.34 could make a great difference to widows who had lived separately from their husbands. One interpretation – the conjunctive, or 'widow-friendly' interpretation of the statutes, giving full effect to the 'and' between the requirement of voluntary leaving and that of staying away in adultery – allowed the widow to argue against the exception that she had not left willingly, having been forced out by her husband, or else abducted. The alternative, 'widow-unfriendly' interpretation, by concentrating on the adulterous living away, disallowed the circumstances of the claimant's departure as an effective argument against the exception. Under this interpretation, however involuntary or coerced the woman's departure might have been, she would be vulnerable to a c.34 exception to her dower action if she ever lived in adultery thereafter.

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<sup>4</sup> See, e.g. the claims of beating, mistreatment and injury in *Matilda, widow of Nicholas Credelman, v.*

The change is well illustrated by two contrasting cases. In the first, *Simon de Lyndeseye and Isabel his wife v. Ralph son of William* (1307), it was argued that the action of dower should be barred because Isabel had left her first husband, John, ten years before his death, and had gone from their home in Westmorland to ‘her adulterer’, Simon, in Yorkshire, and that there had been no subsequent reconciliation with John. Simon and Isabel argued that the action of dower should not be barred, because she had not left willingly. Rather, John had removed her from himself with force and would not let her come back. Staunton J. looked at the statute and consulted Hengham, closely involved in its creation, before announcing that, for the exception to succeed, a tenant had to plead and show both willing departure and staying away from the husband.<sup>6</sup> Logically, therefore, if the widow could resist one of these contentions, the exception would not be made out.

More than five and a half centuries later, *Woodward v Dowse* (1861) came to a very different conclusion.<sup>7</sup> Henrietta, widow of John Woodward, claimed land in Lincolnshire. The c.34 adultery exception was made, alleging that Henrietta had lived adulterously with one John Cabourn. Henrietta alleged in replication that she had been forced to leave by her husband’s cruelty, which rendered cohabitation with him unsafe, and that she had been unable to return because of this cruelty and because of her husband’s living in adultery ‘with a woman named Hibbins’. The court, however, decided that, in order to make an effective reply to an exception under Westminster II c. 34, a widow needed to deny both leaving her husband willingly and also living in adultery after the separation. The job of the tenant was, therefore, made considerably easier and that of the claimant rather more difficult than would have been the case

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*William Fouke* (1373) TNA (The National Archives) CP 40/455 m. 454.

<sup>5</sup> See Baker, *Introduction to English Legal History*, 4<sup>th</sup> edn (London, 2002), 483-9.

<sup>6</sup> *Seipp* 1307.067rs; YB 35 Edw. I Trin. pl. 5; CP 40/164 m. 251, *Simon de Lyndeseye and Isabel his wife v. Ralph son of William*.

under the *Lyndeseye* interpretation of the statute, and this more ‘widow-unfriendly’ view became orthodoxy in England thereafter.<sup>8</sup>

These two cases show a stark contrast in approach to interpretation of c.34. The remainder of this article will chart, and seek to explain, the change. It will begin to do so by focusing on the views of Sir Edward Coke on this issue, which formed one of the factors contributing to the change.

### **Coke’s treatment of c.34**

In the second part of his *Institutes of the Laws of England*,<sup>9</sup> published posthumously in 1642, though probably written before 1630,<sup>10</sup> Coke claimed that when a widow claimed dower, her action could be barred by any period of living in adultery after her departure from her husband (without subsequent reconciliation), and that it was not necessary for the tenant also to plead or show her voluntary elopement.

‘[A]lbeit the words of this branch lie in the conjunctive, yet if the woman be taken away not *sponte* but against her will, and after consent, and remain with the adulterer without being reconciled etc., she shall lose her dower, for the cause of the bar of dower is not the manner of the going away, but the remaining away with the adulterer in adultery without reconciliation.’<sup>11</sup>

In this passage, Coke admitted that his view did not amount to a straightforward, literal, reading of the clause, in which the words were clearly ‘in the conjunctive’. He took a purposive, ‘equitable’ or anti-literalist, approach to interpretation in this instance, deciding that women’s adultery rather than their desertion and adultery was the real mischief against which the act should be taken to have been aimed.

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<sup>7</sup> 10 Common Bench Reports (NS) 722

<sup>8</sup> *Bostock v. Smith* (1864) 4 Beavan 57; National Archives (TNA) C 16/118/B109.

<sup>9</sup> A. Musson, ‘Sir Edward Coke and his *Institutes of the Laws of England*: an exercise in Legal History?’ *Archives* 31 (2006) 95-107, 95.

<sup>10</sup> J.H. Baker, ‘Coke’s Notebooks and the sources of his reports’ *The Legal Profession and the Common Law* (Hambledon, London and Ronceverte, 1986) 177-203, 195.

<sup>11</sup> 2 *Inst.* 435.

Since contemporary opinion was open to purposive or ‘equitable’ interpretations of statutes, such an approach cannot be assumed to have been illegitimate just because it did not take the statute’s words at face value,<sup>12</sup> but it is interesting to note that, in this area, Coke appears to have varied his approach between literalism and purposive interpretation,<sup>13</sup> making it hard to escape the conclusion that he was prepared to choose whichever approach provided the doctrine which he wished to set out. In this case, his preferred doctrine seems to have been that which would reduce the chances of dower for widows suspected or accused of adultery, whose husbands had not forgiven them their apparent or actual offence.<sup>14</sup>

The interpretation of Westminster II c.34 which Coke favoured, concentrating on the accusation of adultery rather than the circumstances of a woman’s departure from her husband, was not the dominant interpretation for a considerable period after the passing of the statute,<sup>15</sup> appears not to have been adopted by the profession in the

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<sup>12</sup> F. Bennion, *Statutory Interpretation* (London, 2002), 400, 401, 406; *Eyston v Studd* (1574) 2 Plowden 459, 75 ER 692; *Stradling v Morgan* (1560) 1 Plowd 199, 75 ER 305; 1 Co Inst 24b; 4 Inst 330; *Heydon’s case*, (1584) 3 Co. Rep 7a, 7b. Blackstone, *Commentaries*, iii, 222; Baker, ‘Coke’s Note Books’, 194.

<sup>13</sup> He took a very literal line on the requirements for showing reconciliation under c. 34, but a purposive, anti-literal approach when considering what had to be shown in order for the exception to be made out. In both cases, he chose the interpretation which was less favourable to the widow. Likewise, (II, 436) while was not prepared to follow the wording of the statute in insisting that both willing leaving and staying away had to be shown, he used close study of the statute’s words to assert that the woman did not need to remain in adultery: as long as she committed it, once, that would be a ‘tarrying’ within the statute, even if the adulterer subsequently kept her against her will.

<sup>14</sup> In his first *Institute*, Coke was, however, relatively generous with regard to the lands to which dower would apply, in cases of reconciliation after an adulterous elopement: Co. Litt. 33a note 8, *Menvill’s Case*, 13 Co. Rep. 33; see M. Phillips, ‘Dower: effect of adulterous separation and subsequent condonation’, *Intramural Review of New York University*, 7 (1952), 262-4, 262.

<sup>15</sup> See Seabourne, ‘Copulative complexities’. Note also that cases of the mid-fourteenth century suggest that there was greater emphasis on the elopement aspect than the adultery aspect of pleading. In *Seipp* 1330.607 (JUST 1/633 m.53; YB 4 Edw. III Hil. pl. 158), Scrope C.J. stated that the tenant ‘need not specify the time or place where [the woman] lived with her lover, but only the place where she left her husband’. In *Seipp* 1332.104, which I identify as *Eufemia widow of John le Breton v. John de Heselarton and William de la Pole* (1332) CP 40/291, unnumbered membrane between m.173 and 174, the widow attempted to argue that the tenant was obliged to plead that she had remained away in adultery, and that failure to do so rendered the exception ineffective. This did not succeed, however, and the widow was driven to plead that she did not leave her husband as mentioned. See also *Seipp* 1329.086 YB T. 3 Edw III, f. 23b pl. 9, which I identify with CP 40/278 m. 21J. Rastell, *Termes de la Ley* (London, 1527, 1636) p. 142 definition of ‘elopement’.

fifteenth and sixteenth centuries,<sup>16</sup> and was probably not the undisputed view in Coke's own day. A high-profile contemporary case was decided the other way. In *Grene v Harvyne* (1614), a London case,<sup>17</sup> the claimants succeeded in recovering Eleanor Grene's dower despite the fact that, during the life of her deceased first husband, William Harvyne, gentleman, she had, unarguably, committed adultery by 'marrying', and living with, two further husbands. Her win can only be ascribed to her success in negating the allegation of voluntary leaving of William Harvyne, her story being that William was 'removed from her by his friends', who led her to believe that he was dead, and, perhaps, encouraged her to remarry. Despite the well-documented problems with contemporary law reporting,<sup>18</sup> it is hard to believe that Coke did not know of this scandalous case involving important London citizens, (including Sebastian Harvyne, citizen, alderman, and later mayor of London),<sup>19</sup> particularly since the Judges of the Bench had been involved in an early part of proceedings, to decide a jurisdictional point.<sup>20</sup>

Coke would also be aware that early-modern attempts to legislate for women to lose their dower (and sometimes other property) when found guilty of adultery, without a necessary requirement of elopement, in 1543, 1601, and 1614, had failed.<sup>21</sup>

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<sup>16</sup> See S.E. Thorne (ed.), *Readings and Moots at the Inns of Court*, Selden Society 71 (1952) 1954 pp. 97, lxxviii, lxxxi, lxxxiii, lxxxvi, xcii; A. Fitzherbert, *La Nouel Natura Breuium*, (London, 1534), 171.

<sup>17</sup> TNA CP 40/1945 m. 1559, *William Grene and Eleanor his wife v Sebastian Harvyne and Maria his wife*; C. Viner, *A General Abridgement of Law and Equity* (London, 1792) 23 vols, IX, 241.

<sup>18</sup> Musson, 'Sir Edward Coke', 100; D. Ibbetson, 'Law reporting in the 1590s' in C. Stebbings (ed.), *Law Reporting in Britain* (London 1995), 73-4, 80-7.

<sup>19</sup> Sir Sebastian Harvyne or Harvey, son of a mayor and himself an alderman 1609, sheriff 1609-10, mayor 1618-19: W. Thornbury, *Old and New London vol. I*, ((London, 1878), 400; A.P. Beaven, *The Aldermen of the City of London Temp. Henry III – 1912* (London, 1908), 179.

<sup>20</sup> This case falls into the period of Coke's lost notebooks: the manuscripts designated F and G in Baker's study. J.H. Baker, 'Coke's Notebooks and the sources of his reports' *The Legal Profession and the Common Law* (Hambleton, London and Roncerverte, 1986) 177-203, 180.

<sup>21</sup> K. Thomas, 'The Puritans and adultery: the act of 1650 reconsidered', in D. Pennington and K. Thomas, (eds), *Puritans and Revolutionaries*, (Oxford, 1978), 257-82; *Lords Journal* i, 215, 221, 224, 226; S. D'Ewes, *The Journals of all the Parliaments during the reign of Queen Elizabeth*, (London, 1682), 641; W. Notestein, F.H. Relf and H. Simpson (eds), *Debates 1621*, 7 vols, (New



He could, therefore, be seen to have been attempting to do through the medium of legal commentary what neither case law nor legislation had done. The fact that he would express such a view as if it were uncontroversial is not, however, surprising, given other examples of his writings' tendentious nature, and, at times, inaccuracy.<sup>22</sup>

Although Coke's view, that it was adultery rather than leaving which was (and had always been) the key issue in these cases, was contrary to previous interpretations, similar ideas could be deduced from some older sources.

The thirteenth-century treatise *Britton* set out advice to defendants in using the adultery exception –

*'On purra dire qe ele ad dowarie deservi et forfeit per soen avouterie, car ele s'en ala [de soen mari] a autri lit puis ceo qe il la esposa, et issi forfeit ele dowarie...'*<sup>23</sup>

This was later read as suggesting that the issue is not whether the initial leaving was or was not a voluntary departure: the wife had in fact gone from her husband to a lover's bed, and that was enough. It could equally be seen, however, as implying a quick transfer from husband's bed to lover's, and therefore a purpose at the time of leaving which would qualify the departure as voluntary, as c.34 requires. '*S'en ala*' also suggests purpose and independence on the part of the woman. The passage in *Britton*, then, provides only equivocal support for Coke's interpretation.

Another source which apparently supports Coke's view, and of which much is made in Coke's *Institutes*, is *Paynel's Case* (1302).<sup>24</sup> In the Parliament Rolls' entries relating to this sensational and much-cited case, it is noted that dower was claimed,

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Haven, 1935), vii, 629. A great desire to act against adultery persisted in some circles, leading to success in passing penal legislation against adultery later in the seventeenth century: see further below.

<sup>22</sup> Musson, 'Sir Edward Coke', 103.

<sup>23</sup> F. Nicholls (ed.), *Britton*, vol. II, p. 281. A [tenant] may say that she has forfeited and lost dower by her adultery, in that she went away from her husband after he married her for the bed of another, and so she forfeited her dower.

<sup>24</sup> CP 40/130 m. 154d (1299); RP I, 146-7 (1302); F. Pollock and F. W. Maitland, *The History of English Law before the time of Edward I*, second edn., 2 vols. (Cambridge University Press, 1968), vol. II, 395-6.

the adultery exception was made and the claimant argued that the exception did not apply because, rather than there having been an elopement and adultery, the wife had been ‘demised’ to the alleged adulterer by her husband. This argument was unsuccessful. The case, however, is not clear evidence that adultery was the real focus of the statutory exception, and that, therefore, as Coke argued, it would always be necessary for a claimant to negate adultery, even when her case was that she was driven off by her husband, and so did not elope.<sup>25</sup> *Paynel’s Case* seems better explained as a decision exploring the word *sponte*,<sup>26</sup> and deciding that, if leaving is not against the husband’s will, that does not stop it being *sponte* as far as the wife is concerned. The claimants’ case did not, in fact, amount to an allegation that the departure was involuntary on the woman’s part – merely that, as demonstrated by the transfer, it was not against the will of the husband.<sup>27</sup> The victorious view in the *Lyndeseye* case (which Coke did not discuss)<sup>28</sup> was contrary to his view and to his interpretation of *Paynel’s Case*. It is hard to imagine that the judges in *Lyndeseye* had not heard of *Paynel*, and it therefore seems unlikely that *Paynel* was understood by contemporaries to support the meaning which Coke would attach to it.

Coke’s view had antecedents in unsuccessful arguments run by lawyers in other early cases. The idea that a woman who had left her husband, however blamelessly, could lose her dower action under the c.34 exception if she subsequently

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<sup>25</sup> In a connected plea roll entry, the widow denied adulterous elopement, explaining that she had been living with William, the alleged adulterer, for innocent reasons, for her sustenance and that of her (legitimate) children, bringing herself within the same category as a number of previous widows. The case set out in the Parliament Rolls, however, was both fuller and stranger, relying on the deceased husband’s ‘demise’ of Margaret (rather than, as in the Plea Roll, a piece of land), to William, and using this to deny that Margaret had lived with William in adultery. TNA CP 40/130 m. 154 (1299). For later confirmation that a ‘wife demise’ did not assist a claimant in such cases, see *Coot v Berty*, 12 Mod. 232.

<sup>26</sup> ‘willingly’ – a requirement of c.34.

<sup>27</sup> One might wonder why this was thought to be an argument against the exception: was a departure with the husband’s consent not really a departure from him, or was the wife’s will thought to be overborne by the husband’s to such an extent that, if he consented to the departure, it could not truly be regarded as *sponte* on her part?

lived in adultery was a significant argument or dissenting view in a number of cases, and there are signs of it in other legal sources. The view that the onus was on the widow to negative both voluntary leaving and adulterous living was argued in some fourteenth century cases, from *Lyndeseye*, through *Ropet v Anon* (1309X1320),<sup>29</sup> to, perhaps, *Anon* (1345).<sup>30</sup> The issue was revisited in *Tyryngton v. Beauchamp* (1369), a case which Coke does cite (from the Year Book report). Here, a dower claim was made, the c.34 exception was pleaded, and the claimants stated in replication that the widow had been abducted rather than having left *sponte*. Though they had not made a specific denial that she had lived in adultery, their pleading certainly passed the requirement set by *Lyndeseye*. The tenant's serjeant, however, said that remaining, by her free will, without reconciliation, would have been enough to forfeit the dower. The claimants contended that, since the statutory defence was 'copulative', they need only traverse the elopement. Rather than straightforwardly following *Lyndeseye*'s line and agreeing, however, the court found that the widow's pleading amounted to a traverse of both willing leaving and willing staying away. Coke cited the Year Book report of *Tyryngton* in support of his position,<sup>31</sup> but, although they show some support for the view later taken by Coke, neither this nor the Plea Roll entry justifies the proposition that a plea of non-*sponte* departure is not enough to resist the c.34 exception. At its furthest stretch, its conclusion was that, if the woman has, on a common sense reading of her pleading, denied both elements, the tenant cannot make the argument that she has failed in the common law requirement of symmetry in

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<sup>28</sup> Note that the failure to examine cases in the Plea Rolls may be understandable, due to the 'chaotic' state of the public records in Coke's day: Musson, 'Sir Edward Coke and his *Institutes*', 97.

<sup>29</sup> *Seipp* 1315.120ss, D.D. Sutherland, *The Eyre of Northamptonshire 3–4 Edward III (1329–30)*, 2 vols. (London, Selden Society, 1983), vol. II, 793–4.

<sup>30</sup> *Seipp* 1345.104rs; YB 19 Edw. III Trin, pl. 5.

<sup>31</sup> Coke II *Inst.* 435, referring to YB 43 Edw. III f. 19.

pleading and denying everything the opposition alleges.<sup>32</sup> Coke's view was foreshadowed in the losing side's argument in this case, and in *Lyndeseye*, but was certainly not endorsed.

A tendency towards Coke's view can also be seen in the *raptus* statute of 1382, which moved away from the 1285 formulation (barring women from dower if they left and lived in adultery, and were not reconciled), instead barring their land actions if they had 'consented' after a ravishment, despite any earlier lack of consent to the separation from the husband.<sup>33</sup> The statute appears to have been unpopular, however, and did not displace Westminster II c.34 in the dower context.<sup>34</sup> Thus, its focus on adultery rather than leaving did not render obsolete the c.34 insistence that it was necessary to show or plead voluntary leaving of the husband by the wife before a tenant could resist a widow's claim for dower.

Although Coke's view was not wholly unprecedented, therefore, it could not claim strong foundations in legal orthodoxy. That being so, it is worth asking why he might have been so keen to put forward as uncontroversial this particular 'widow-unfriendly' interpretation.

An initial point to note is that it was part of a pattern which saw Coke twisting a Latin aphorism in order to go beyond c.34's specific bar for leaving and adultery and to link dower to proper behaviour by a woman,<sup>35</sup> taking a line inconsistent with

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<sup>32</sup> This case was as much about integrating a copulative statutory provision into the common law pleading rules as it was about interpretation of the statute itself. On pleading, see Baker, *Introduction*, 76-8.

<sup>33</sup> 6 Ric. II st. 1 c. 6. In *Lyndeseye*, Herle had argued that the widow's going to her adulterer (and allegedly marrying him during her husband's life) had demonstrated her willingness to leave in the first place. Similar arguments can be seen in *Ropet v. Anon*, and in *Tyryngton*.

<sup>34</sup> See *RP*, vol. 4, p. 408b, and, e.g., *Ralph Haworth esq. and Lady Anne Powes his wife v John Herbert and his wife* 73 ER 235, 2 *Dyer* 106b.

<sup>35</sup> Co. Litt., 31 citing a maxim attributed to Ockham, describing *dos* as *praemium pudoris*, i.e. a reward or recompense for decency or modesty. Again, Coke is straining a point by using a quotation which is probably about pecuniary or chattel dowry and nothing to do with land-based, common law dower to back up his assertions on this English institution. On dowries and the medieval academic discourse to

older case law when he asserted that a wife who departed from her husband but remained on his land would be barred of her dower action under Westminster II c.34 (despite a medieval case which, as he acknowledged, said the opposite), and in claiming that a widow who lied about a pregnancy could lose her dower.<sup>36</sup> Coke did not express a general aversion to the idea of dower, and some of his decisions were relatively favourable to widows,<sup>37</sup> but the uncondoned prior sexual misdemeanours of dower-claiming widows seems to have aroused very strong feelings in him.

It is very tempting to see in his insistence on a hard line against adulterous women claiming dower some influence of his personal circumstances. It does not seem unlikely that his ill-fated second marriage, with its disputes over matters including property, and his wife's rumoured infidelity, might have hardened his views against wives and their provision in the event of a husband's death.<sup>38</sup> Furthermore, it seems possible that the misadventures of Coke's daughter Frances (Lady Purbeck) might have had some influence on his opinions. Frances, whom Coke had married off for political reasons and against her own wishes and those of her mother, did not enjoy conjugal bliss. She was found guilty of adultery in 1627, having left her possibly insane husband for another man, and was sentenced to humiliating public penance.<sup>39</sup> Either anger with her for the disgrace she had brought upon him, or a wish

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which the idea quoted in Coke more properly belongs, see I.P. Wei, 'Gender and sexuality in medieval academic discourse: marriage problems in Parisian quodlibets', *Mediaevalia* 31 (2011) 5-34.

<sup>36</sup> Coke, *Institutes*, II, 435-6.

<sup>37</sup> See above, note 14. Dower was relatively easily avoided in Coke's era, by employing the jointure, and was not the subject of the sort of condemnation which it would receive in the nineteenth century.

<sup>38</sup> See A.D. Boyer, 'Sir Edward Coke 1552-1634', C. Matthew and B. Harrison (eds), *Oxford Dictionary of National Biography, online edition*, <http://www.oxforddnb.com>, *James I State Papers Domestic 1611-18*, 468, 469, 471, 495, 515, 530; J. Turner, 'Concerning divers notable stirs between Sir Edward Coke and his lady', *American Law Review* 51 (1917) 883-903.

<sup>39</sup> See, e.g. E. Ross, 'The case of the crying bride: gossip letters about the wedding of Frances Coke', *Comitatus* 40 (2009), 231-47; Turner, 'Concerning divers notable stirs', 883, 900, 902,

to be seen to be opposing adultery, given his association with this scandal, might be imagined to have contributed to Coke's harsh line on this issue.<sup>40</sup>

### **From Coke to the 1860s**

Coke's view was not confirmed as orthodoxy until the nineteenth century. Partly, as argued above, this was because it did not represent the dominant or undisputed view amongst lawyers. Another reason may have been the lack of opportunity to debate the issue in a case. Dower remained a possible mode of provision for widows until the twentieth century, but there is general agreement that it was, in practice, avoided by a significant number of families. The rate of decline in the applicability of dower amongst the wealthiest classes, and the extent to which dower remained relevant to other sections of society are issues on which there is little robust evidence,<sup>41</sup> but, at least for the wealthy, upon whom most lawyers and many legal historians have concentrated, dower was, from the early modern period, being overtaken by other modes of provision, such as trusts in general and, in particular, by the jointure.<sup>42</sup> Once jointures took hold, there were fewer dower actions, and, therefore, fewer opportunities to explore or challenge the accepted, conjunctive, interpretation of the c.34 exception.

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<sup>40</sup> Intriguingly, Frances came to live with her father during the last years of his life, and may even have embroidered a cover for some of his legal writings: Baker, 'Coke's Notebooks', 180. It should also be borne in mind that Coke's legal life spanned a time of uncertainty as to the lines which divorce law would take in a Protestant England: L Stone, *The Road to Divorce: England 1530-1987* (Oxford, New York, 1992), chapter X. Important issues about matrimonial behaviour and the consequences of marriage breakdown were 'up for debate'.

<sup>41</sup> See further below. Note that not all those of high social station avoided dower, and that there were cases in which c.34 was pleaded: see *Elizabeth Lady Dowager Boyne v Frederick Hamilton* (1773) *Irish Morning Chronicle and London Advertiser*, 28<sup>th</sup> August 1773.

<sup>42</sup> The jointure was an alternative to dower. Concluded by agreement rather than arising as of right, it gave a widow a life interest in a stipulated amount of property, rather than in the one-third which was the rule in dower. See, e.g., Statute of Uses 1536, cc. 4-7, Co. Litt., 37b; Bl. Com. II p. 137. Jointures were not subject to an adultery exception: *Field v Serres* (1804) 1 Bos. & Pul. NR 123; 127 ER 405; *Sidney v Sidney* 3 P Wms 269 (1734) (where the argument was made that equity should follow the law and disallow enforcement of marriage articles where there had been adultery on the wife's part); *Blount*

Those judges and writers who dealt with the issue after Coke's time took different views, some in clear opposition to his. Coke's view was not adopted in discussions in King's Bench in *Manby v. Scott* (1663): here, defence counsel stated that adultery without elopement and elopement without adultery were not bars to dower.<sup>43</sup>

A treatise of 1700, *Baron and Feme*, gave a mixed message, stating that:

'If the wife elope, she is barred of her dower. If the wife elope from her husband, viz. if the wife goeth away and leave her husband, and tarrieth with her adulterer, she loseth her dower until her husband willingly and without coercion Ecclesiastical be reconciled to her and permit her to cohabit with him.'<sup>44</sup>

which appears to require both leaving and living with an adulterer, before noting that:

'if the woman be taken away not *sponte* but against her will, and after consent remain with the adulterer, without being reconciled etc., she shall lose her dower'.

The latter is contrary to *Lyndeseye* and in line with Coke.

A more straightforwardly conjunctive setting out of the statute, with the implication that both elopement and adultery must be proved, is found in Comyns' *Digest of the Laws of England* (1762).<sup>45</sup> Clearly, there was not universal genuflection before Coke in the eighteenth century. Gilbert, *The Law of Uses and Trusts* (1734) did not cite Coke on adultery/elopement, though did so in relation to other aspects of

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*v Winter* 3 Cox's P Wms 276; *Ball v Montgomery* (1793) 29 ER 924, *Richardson v Fry*, *Morning Post*, 15<sup>th</sup> May, 1826, CCP.

<sup>43</sup> 1 Keble 337 at 341. 83 ER 980, citing the 1572 case of Sir John Stowell (or Stawel) and Mary, his wife, on which, see Stone, *Road to Divorce*, 305, Sir L. Dibdin and Sir C.E.H. Chadwyck Healey, *English Church Law and Divorce* (London, 1912), 82-92, 152-3; G.D. Stawell, 'A Quantock family: the Stawells of Cothelstone and their descendants the barons Stawell of Somerton and the Stawells of Devonshire and the County Cork' (1910). Mary Stowell's assignment of dower: TNA C142/687/213-5

<sup>44</sup> *Baron and Feme: A Treatise of the Common Law concerning Husbands and Wives* (London, 1700), 90.

<sup>45</sup> Comyns' *Digest of the Laws of England* (1762).

dower.<sup>46</sup> Viner's *General Abridgment* gave Coke's view, and no doubt popularised it,<sup>47</sup> but Blackstone set out an apparently 'copulative' test.<sup>48</sup>

An important step towards the acceptance of Coke's view was taken in *Hethrington v. Graham* (1829).<sup>49</sup> In a claim for dower, the adultery exception was made. The widow replied that, while she did leave of her own free will, it was with her husband's consent, and, if there had been adultery with the party named, it had been during the period of that mutually agreed separation. Hers was a weak case, in that the statute required the wife's leaving to be *sponte*, not 'against her husband's will', and, here, she seems to describe a consensual separation, so not denying her own volition, but stating that her husband was also agreeable to the separation.<sup>50</sup> The case could, therefore, have been decided on that ground. Wider discussion was, however, held. Her serjeant, Wilde, made the argument that a forfeiture statute must be construed strictly, and that all elements must be made out. He relied on the fact that she had not run off with the adulterer, (though, strictly, the statute does not require this). It was the opposing arguments of Serjeant Jones which carried the day, however, and, rather than sticking to his rather strong case on the literal construction of the statute, he broadened the issue out to opine upon its underlying purpose, saying that:

'The principle of the statute is the protection of public morals and the punishment of the offence of the wife. and the concurrence of all the modes of committing the offence specified in the act is not essential to a forfeiture

before going on to cite Coke.

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<sup>46</sup> Gilbert, *The Law of Uses and Trusts together with a treatise of dower* (London, 1734), p. 402..

<sup>47</sup> Viner, *General Abridgement*, vol. IX, 240, 242.

<sup>48</sup> Bl. *Comm.* Book II c 8, s.1; first edition, (Oxford, 1766) p. 130. Cites only Co. Litt., not Inst. II, 435-6. See also the 'copulative' interpretation in W. Beawes (ed.), J. Chitty (ed.), *Lex Mercatoria, or a complete code of commercial law* 6<sup>th</sup> edn, 2 vols, (London, 1813), 1, 694.

<sup>49</sup> 6 Bing. 135.

<sup>50</sup> The woman's case might have been an attempt to argue that the husband's consent to her going meant that she had not, in fact 'left' him, but this was not spelled out, and the court did not take it in this way.



Wilde engaged with the morality argument, with a good riposte that the statute was not really about punishment for moral offences, since it countenanced the restoration of the wife to her dower if she and her deceased husband had been reconciled. The Lord Chief Justice, however, was not persuaded. It was reported in the press that the court had adjourned, ‘as it was a case of old and subtle learning’, so that they could ‘look into the authorities and give judgment hereafter’.<sup>51</sup> Heavily reliant on Coke, and going further than was necessary to decide the case in issue, he stated as a matter of ‘good sense and policy’ that ‘if a woman committed adultery although she might in the first instance have quitted her husband with his consent as well as of her own free will, her right to dower ought to be forfeited’.

*Hethrington* led to greater acceptance of the Coke line,<sup>52</sup> but there were attempts to distinguish it,<sup>53</sup> and resistance to extending it,<sup>54</sup> and the end of the story is really in the 1860s with the judgment in *Woodward*, confirmed in *Bostock v Smith*. In *Woodward v. Dowse* (1861),<sup>55</sup> as noted above, the widow’s action of dower failed, and this was despite the fact that it was accepted that she had initially been forced to leave by her husband’s cruelty, and that she had been unable to return because of his cruelty (which made it unsafe for her to live with him) and his adultery. The tenant’s counsel, Serjeant Hayes, cited Coke and his version of *Paynel*.<sup>56</sup> Hayes put forward the Coke-like view that ‘the substance must be looked at, not the mere words of the

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<sup>51</sup> *Morning Post* 1<sup>st</sup> July 1829; *Morning Chronicle* 7<sup>th</sup> July, 1829.

<sup>52</sup> S. Smith Bell, *The Law of Property as arising from the Relation of Husband and Wife* (Philadelphia, 1850), p. 250.

<sup>53</sup> See arguments of Henrietta Woodward’s counsel, Wills, in *Woodward v Dowse* at 725.

<sup>54</sup> Note also that, in *King v King*, a court resisted the suggestion that a widow should be barred of her dower if she had, as alleged, committed adultery with ‘divers men’ at home (though in the absence of - and living separately from - her husband, who was confined on grounds of lunacy): *King v King*, *Morning Post* 22<sup>nd</sup> February 1837 (Vice Chancellor’s Court).

<sup>55</sup> 10 *Common Bench Reports* (NS) 722.

<sup>56</sup> The discussion of *Paynel’s Case* caused hilarity in court, laughter breaking out when it was mentioned that the wife in the case had been assigned to the alleged adulterer ‘with all her appurtenances’: *Daily News*, 21<sup>st</sup> June 1861, ‘Law intelligence’. Note that this case was ‘rediscovered’ periodically – see, e.g., ‘Sale of Wives’, *St James Chronicle or the British Evening Post* 19<sup>th</sup> Jan 1790.

statute'. As a back-up, he also claimed that 'If she be not ravished, the eloinment of the wife is *sponte*' - a harsh interpretation of what negated volition in a woman's leaving. The suggestion that only abduction would do was clearly contrary to previous cases such as *Lyndeseye*. Williams J agreed with the anti-literalist approach, though not for the same reasons as counsel for the tenant. Rather than basing himself on the presumed substance of the incident, he felt himself bound by authority as interpreted by Coke, saying:

'Whatever might be our notion as to the proper construction of the statute in question, if we had been called upon to construe it immediately after its passing, there can be no doubt that it received soon after that period an exposition which has been uniformly acted upon in modern times. I refer to the commentary of Lord Coke in 2 *Inst.* 435. ... That passage was cited and received as good law in *Hethrington*... where the court gave a considered judgment.<sup>57</sup>

He followed Coke in saying that it is not the manner of the going away but the remaining away in adultery which counts. Here, the replication amounted to an admission of adultery, remaining away without reconciliation, so the statute, he decided, barred the widow's claim in dower.

Willes J indulged in some moralising, noting that where, as here, a wife was mistreated, she was 'sent forth with authority to pledge [her husband's] credit, but [was] bound to conduct herself properly'. It could not be said that the husband's conduct was the cause of Henrietta's committing adultery: it was, rather 'the result of her yielding to temptation'. Adopting the low threshold for '*sponte*' which had been suggested by Hayes, he argued that, since Henrietta left her husband 'without, as it appears, being taken away by a third party' and stayed away, and there was adultery and no reconciliation, that was enough to bar her action.

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<sup>57</sup> p. 64.

Shortly afterwards, the Staffordshire case of *Bostock v. Smith* (1864)<sup>58</sup> confirmed the hard line and the debt to Coke. After the tenant argued a c. 34 exception, the claimant's counsel, Mr Hobhouse, argued that: (i) adultery was not proved; and (ii) the woman had not left *sponte sua*, but had been compelled by the cruelty and misconduct of her husband.

The Master of the Rolls, Sir John Romilly, said that there had been unspecified bad treatment and 'gross misconduct' by the husband, though, at his instruction, the facts relating to this misbehaviour were kept from the report.<sup>59</sup> The tenant's counsel cited Coke, *Hethrington* and *Woodward* and won the day, the Master of the Rolls agreeing that, since the adultery was in fact proved, that was enough for the exception to succeed. The cases cited were conclusive, and the widow lost. Romilly summed up the harsh and moralising view the courts were now taking in such cases:

'It is but proper to state that she left her husband in consequence of her husband's behaviour and gross misconduct, which was such as would justify, if anything could justify, her act. But nothing could justify it.'

Clearly, they considered, a widow should be made to pay for her unjustified conduct by losing her action of dower.

### **Why a harsh line might have been more acceptable in the nineteenth century**

Important factors in the acceptance of a harsher line – combining Coke's interpretation of the elements of the exception with an increasingly low threshold of volition - appear to have been: a desire to cut down dower in general, changing

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<sup>58</sup> 4 Beavan 57.

<sup>59</sup> Some depositions and other documents relating to this case survive – TNA C 16/118/B109 - but, contain no details of the 'gross misconduct'.

judicial conceptions of judges' own role and that of the law, and a rather reverential reliance on Coke.<sup>60</sup>

'As I am against dower altogether, I wish, if there is to be such a thing, to cut it down as low as possible.'<sup>61</sup>

In the context of the opinion of dower amongst influential lawyers and members of the political class, the move to interpret c.34 of Westminster II in such a way as to reduce the likelihood of a widow recovering dower lands is not entirely surprising.

Although previous generations of lawyers and legislators had at least paid lip-service to the importance of dower, and the policy of upholding it,<sup>62</sup> many nineteenth century lawyers openly expressed a dim view of it.<sup>63</sup> A frequently-aired set of arguments portrayed dower as bad for men, a hindrance on commerce and unnecessary or useless, if not actually damaging, to women. Such attitudes are evident in the Real Property Commissioners' First Report from May 1829 and in the responses and evidence of many of those contributing to the Commissioners' inquiry. Dower was said to be an incumbrance, creating expense and uncertainty for those who wished to buy and sell land, a clog on the ideal of free commerce in land. It had become 'highly inconvenient' because of changed circumstances since the institution first appeared; in particular, the more frequent transfer or charging of estates in the

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<sup>60</sup> Theory of statutory interpretation was a matter of debate in the nineteenth century, with different emphases placed on literalism and purposive interpretation. see, e.g., F. Dwaris, *General Treatise on Statutes and Their Interpretation* (1835).

<sup>61</sup> *First Report of the Real Property Commissioners* (1829), House of Commons Sessional Papers 1829, x.1. p. 408 Nassau William Senior esq.. See also : J.A. Christie, p. 274.

<sup>62</sup> See, e.g., Statute of Uses, preamble, *Banks v Sutton* (1732), 2 P. Wms 702-3 on the wife's 'moral right to a dower'. Lawyers had, however, been content to follow cases which held that there was no dower in equitable property, despite the fact that they had a somewhat unconvincing pedigree. Staves, *Married Women's Separate Property*, 17, c.2; *Chaplin v Chaplin* (1733) 3 P. Wms 229. Note that, at 44, she shows that there were cases from the 1650s to 1732, which did allow dower of equitable property.

<sup>63</sup> Note, however, that some saw evasion of dower as morally suspect: *Hansard HC Debates* 14<sup>th</sup> June, 1832, col. 698.

nineteenth century than in medieval England.<sup>64</sup> Recent industrial developments such as the increased exploitation of mines could enhance the importance of land as opposed to personal property, and dower appeared to many married men a particularly unattractive system of provision for widows.<sup>65</sup> Dower was argued to be unnecessary for widows themselves, since they could now be provided for out of the husband's personal property rather than his realty.<sup>66</sup> Commentators argued from the prevalence of jointures (which, if made at the correct time, meant that dower was excluded) and the fact that, with competent legal advice, it was, in any case, easy to render dower inapplicable by conveying land to trustees,<sup>67</sup> that dower was outmoded and unnecessary. Dower was also said to be injurious to widows, tempting them into litigation,<sup>68</sup> and to wives, who were obliged to be involved when a man wished to sell or mortgage land (an involvement assumed to be detrimental to them).<sup>69</sup> The retention of dower whilst there were ways of evading it was seen as inefficient in that uncertainty as to some of the methods of evasion could encourage litigation and expense.

Increasingly, awarding the widow a fixed share of land at the husband's death was also seen as an unwarranted interference with what ought to be a matter of choice for the husband or contract amongst the males of the families of both spouses, rather than a matter for set legal rules.<sup>70</sup> As Park put it in an influential treatise,

‘Independence of mind, as well as the finer sensibilities, revolt from the idea of a stated compulsory appropriation of property in a case where moral duty and the

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<sup>64</sup> *First Report*, 8, 16; *Morning Chronicle*, 19<sup>th</sup> June, 1829.

<sup>65</sup> *Houghton v Lee*, *Morning Chronicle*, 2<sup>nd</sup> November, 1807.

<sup>66</sup> *First Report*, 8, 16. *Morning Chronicle*, 19<sup>th</sup> June, 1829.

<sup>67</sup> Dower did not apply to equitable property: J.S. Anderson, ‘Property Law’ in W. Cornish, J.S. Anderson, R. Cocks, M. Lobban, P. Polden, K. Smith, *Oxford History of the Laws of England Vol. XII: 1820-1914, Private Law*, 1-294, 129.

<sup>68</sup> *First Report*, 18.

<sup>69</sup> *First Report*, 491.

<sup>70</sup> *First Report*, 258.

domestic affections, afford a surer pledge among the virtuous than positive institutions.’<sup>71</sup>

The assertion that dower was not much use to widows at this time deserves a more thorough investigation than can be given in the confines of this paper.<sup>72</sup> A number of points may, however, be noted here. Although the Real Property Commissioners felt able to state that:

‘[T]he right to dower exists beneficially in so few instances that it is of little value considered as a provision for widows, and we believe it may be confidently asserted that it is never calculated on as a provision by females who contract marriage, or their friends...’<sup>73</sup>

some doubt may be raised as to the reliability of such statements on the lack of applicability of dower because of the lack of consideration of the views of women or of those who did not routinely consult a lawyer. All of the Real Property Commissioners and those giving evidence before them were successful lawyers, with many being conveyancers in particular,<sup>74</sup> and their clienteles seem likely to have been drawn from the upper echelons of nineteenth century society. They may well not, therefore, have been concerned with, or familiar with, the lives and dealings of those landowners who were somewhat lower down the social scale. Secondly, they were all male. Some women, at least, had spoken up for dower’s importance, objecting to the right being cut down ‘by caprice of their husbands’,<sup>75</sup> but women’s opinion went unelicited, their voices unheard, at the Commissioners’ inquiry. Thirdly, there are some indications of the continued use of dower. For example, one king’s counsel

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<sup>71</sup> J.J. Park, *A Treatise on the Law of Dower* (London, 1836), 2.

<sup>72</sup> *First Report*, 490, John Tyrell: ‘it is not in more than one case out of several hundreds that a widow is entitled to dower out of the real estates of her husband.’

<sup>73</sup> *First Report*, 17.

<sup>74</sup> M. Sokol, ‘Jeremy Bentham and the Real Property Commission of 1828’ *Utilitas* 4 (1992) 225-45, 235.

<sup>75</sup> *Morning Post*, 4<sup>th</sup> April 1827, ‘Petition of the Ladies of Great Britain to the Lord Chancellor’. Note the letters in the same paper, on following days, supporting the petition. See also ‘M.S.R’, ‘The Property of Married Women’, *The Englishwoman’s Domestic Magazine*, 5 (November, 1856), 234.

stated that dower ‘now seldom attaches excepting in cases of smaller estates’,<sup>76</sup> logically supporting the case for dower’s continued importance for some people, and another witness said that he had ‘known instances where it has been a happy thing for the wife and family that the husband has not had the power of stripping her of her pittance of dower’,<sup>77</sup> clearly admitting dower’s advantages and importance to (impliedly, less well-off) widows.<sup>78</sup> Finally, some support for the case for the continuing advantage of dower for women may be found in the fact that some men might resort to divorcing their wives in order to escape this obligation,<sup>79</sup> or to beating them into signing it away.<sup>80</sup>

Those opposed to dower would have welcomed the fact that, under the Dower Act 1833, a widow could, in future, only get dower on lands held by her deceased husband at the time of his death and not on those lands which he had transferred during his life or willed away to a third party.<sup>81</sup> Dower became something which affected estates left on an intestacy, and which a man could cut out of the picture with competent legal advice.<sup>82</sup> Since there was almost certainly a positive correlation between wealth and likelihood of making a will, the effect of the Dower Act will have been to make dower an issue not for the wealthiest people, but for those with some

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<sup>76</sup> *First Report*, 101, W.E. Taunton K.C.

<sup>77</sup> *First Report*, 390, G. Harrison.

<sup>78</sup> It seems peculiar to note instances of hardship in which women may be left unprovided-for on an intestacy where dower does not apply (because the property is equitable) and yet not to see that dower might be helpful in similar cases where the property is legal, see, e.g. *First Report*, p. 491.

<sup>79</sup> See, e.g., *Parkes v Creswick*, *The Age*, 25<sup>th</sup> December 1825, p. 262; *Morning Post* 23<sup>rd</sup> Dec 1825.

<sup>80</sup> *Dyott v Dyott*, *Caledonian Mercury*, 17<sup>th</sup> November, 1814.

<sup>81</sup> 3 & 4 Wm. IV c. 105. On its effects, see, e.g. ‘The Comic Blackstone’, in *Punch*, 3rd August, 1844 p. 63: ‘[A] recent act has made it so easy to bar the dower that the widows are generally done out of their thirds, and instead of the corn, the fruit, or even the vegetables, there is nothing left but the weeds, with which the unfortunate widows can console themselves.’ There was no requirement that the husband make equivalent provision for his widow.

It had been suggested that the Dower Act’s extension of dower to equitable estates was sufficient compensation for the increased ability of men to destroy all dower: *HC Debates* 1832 vol 13 c. 561; *HC Debates* 1833 vol. 15 c. 655. Staves, however, makes a convincing case for saying that this was merely a clearing up of an intellectually embarrassing anomaly which saw different rules for dower and curtesy in this area: Staves, *Married Women’s Separate Property*, 39.

landed property and no regular legal advice.<sup>83</sup> Dower after the Dower Act, it seems, occupied a strange position, declining in use amongst the wealthy and well-advised,<sup>84</sup> but still spoken of as if it was a normal part of provision for widows,<sup>85</sup> and still used and deemed important by some people.<sup>86</sup> Judges were prepared to cut dower down, for example holding it subject to a limitation period, despite not being mentioned in relevant legislation.<sup>87</sup> The increasingly harsh interpretation of c.34 can be fitted into this trend towards the diminution of dower, by legislation and judicial decision.

### A change in mores, and in judges' attitudes to the role of the law

Changes in this area can be seen as part of a trend towards more punitive legal responses to female adultery, dating back to the sixteenth and seventeenth century political movements for criminalisation of adultery,<sup>88</sup> or even to the 1382 *raptus* statute and losing arguments in fourteenth century cases noted above. An intensification, or steep acceleration in this trend can be detected from the late

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<sup>82</sup> Anderson, *Oxford History* vol. XII, 129, noting the lack of figures on number of widows claiming dower in the nineteenth century.

<sup>83</sup> See, e.g. the case of the widow of a Bristol 'slop-seller' in *Sanger v Gardner*, *Morning Post*, 5<sup>th</sup> November, 1823.

<sup>84</sup> Note also that in 1833, legislation streamlined the process of release of claim to dower by the wife: Act for the Abolition of Fines and Recoveries 1833; C.S. Kenny, *History of the Law of England as to the Effects of Marriage on Property* (London, 1879), 59.

<sup>85</sup> An opponent of reform with regard to married women's property still used the availability of dower as an argument against change in 1868: *HC Debates* 1868 vol 192 col. 1352. Dower continued to be discussed in popular writing on property law and in debate on married women's property. A. Barrister, *Every Man's Own Lawyer* (London, 1867). Dower was given as one of the risks of a married man with an adulterous wife in speeches relating to the Mordaunt divorce case: *Morning Post*, 3<sup>rd</sup> June, 1870; *Mordaunt v Mordaunt* (no 2) (1869-72) LR 2 P & D 109.

<sup>86</sup> As late as 1856, there was a request for its extension to certain copyholders: *HL Debates* 1856 vol 140 c 705. In the late 1870s, and even 1912, some parliamentarians were against the cutting down of dower, or thought that the Dower Act had gone too far: *HC Debates* 1876 vol. 230 c.600; *HL Debates* 1877, vol. 235 c. 71; *HC Debates* 1878, c. 1169; *HL Debates* 1912, vol. 11, c.1015.

<sup>87</sup> *Marshall v Smith*, *Daily News*, 7<sup>th</sup> December 1864.

<sup>88</sup> This was, briefly, and mostly theoretically, achieved in 1650: *Acts of the Interregnum* II: 388; Thomas, 'The Puritans and adultery', 258, 272 for attempts to bring in similar punitive legislation in 1543, 1549, 1576, 1584, 1601, 1604, 1614, 1621, 1626, 1628, 1640, 1644, 1649 and later pressure for greater penalties on adulterers from individuals, clergy, societies for the reform of manners, from the later seventeenth century to the nineteenth century. See also Stone, *Road to Divorce*, 243.



eighteenth century.<sup>89</sup> From that point onwards, *assumpsit* cases on whether men had to support their deserting and/or adulterous wives were increasingly strict: a husband did not have to maintain an adulterous wife, even if he had committed adultery himself and ‘turned her out without imputation on her conduct’.<sup>90</sup> In earlier *assumpsit* cases concerning payment for goods and services supplied to a separated wife, the dividing line between a husband’s obligation to maintain and his lack of such obligation was the wife’s (voluntary) leaving of her husband, rather than her adultery.<sup>91</sup> In *Govier v Hancock*, (1796), however, the focus was placed upon the wife’s adultery.<sup>92</sup>

An increasing nineteenth century horror at adultery, and particularly the adultery of women, has been noted,<sup>93</sup> and this was reflected in the increase in awards in *crim. con.* cases, which was seen in the early part of the century,<sup>94</sup> and the penalising of adulterous wives under the Poor Law.<sup>95</sup> There was protest against ‘rewarding adultery’ by compensating wives divorced by act of Parliament for the loss of their dower, jointure or marriage portion. Stone notes a change with regard to maintenance for adulterous wives divorced in Parliament, between c. 1811 and 1830, increasingly requiring them to remain ‘chaste and alone’.<sup>96</sup> Legal opinion against adulterous wives succeeding in dower actions may well also have been increased by a case from the late 1830s in which a widow appears to have been ‘trying it on’,

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<sup>89</sup> Stone, *Road to Divorce*, 255; noting long debates over anti-adultery bills in 1771, 1779, 1800, 1809 and ( p. 273) the ‘moral panic’ of the 1790s.

<sup>90</sup> *Manby v Scott* (above), *Govier v Hancock* (1796) 6 TR 603. See also *Harris v Morris*, *The Morning Post and Gazetteer*, 8<sup>th</sup> July, 1801, ‘Law Intelligence’; *Emmett v Norton* (1838) 6 Car. & P 506.

<sup>91</sup> *Robinson v Gosnold* (1704) 6 Mod. 171, 87 ER 927; see similar views from Hale C.B. in *Manby v Scott* (above)..

<sup>92</sup> 6 TR 603; 101 ER 726 (another case in which Coke’s views on dower and adultery were relied upon).

<sup>93</sup> L. Stone, *Broken Lives: separation and divorce in England 1550-1857* (Oxford, 1993), 24; W.E. Houghton, *The Victorian Frame of Mind 1830-1870* New Haven (1957).

<sup>94</sup> W. Cornish, *Oxford History of the Laws of England* vol. XIII, 733; Stone, *Road to Divorce*, 211-28; S Wolfram, ‘Divorce in England’ (1985) *OJLS* 155-86 at 166-72.

<sup>95</sup> *R v Flintan* (1830) 1 B & Ad 227

arguing that condonation of her previous adultery somehow made c.34 inapplicable with regard to her later adultery.<sup>97</sup> Strong views, and a wish to visit harsher and more certain consequences on female adulterers can be seen in nineteenth century letters in relation to dower.<sup>98</sup>

In the era of *Woodward* and *Bostock*, the debates surrounding the Matrimonial Causes Act 1857, would be familiar. That act had confirmed that simple adultery by the wife was a ground for divorce (while a man's adultery was not a sufficient ground), and debate and coverage had emphasised the horror of women's adultery and its being worse than adultery of men,<sup>99</sup> and, as Cretney has noted, disapproval of the adulterous wife was reflected in a new lack of generosity in maintenance payments in the early years of the new divorce jurisdiction.<sup>100</sup> Disapproval of female adultery was certainly not new at this time, but the idea that law could do something to punish and deter it appears to have been felt with particular intensity in the William IV/Victorian era, and this is reflected in some of the moralising statements in the cases considered, as well as in their results.

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<sup>96</sup> Stone, *Road to Divorce*, 345,

<sup>97</sup> *Halliday v Best*, *Morning Post*, 10<sup>th</sup> November, 1838; 1 *Legal Guide* 90 (1838-9).

<sup>98</sup> 'JBW', *Legal Observer or Journal of Jurisprudence* 10 (1835), 410, objecting that a forgiving ('weak') husband could, by reconciling himself to his adulterous wife, 'bring upon his children an injury by diminishing their rights and expectations'. Letters from 'Carolus' and 'Mancuniensis' in *Legal Observer or Journal of Jurisprudence* 7 (1833-4), 280, 448 (highlighting some misapprehensions about the law). See also T. Poynter, *Concise View of the Doctrine and Practice of the Ecclesiastical Courts on Various Points Relative to the Subject of Marriage and Divorce* (Philadelphia, 1836), 65. and clergymen showed an unforgiving attitude to it: HC Debates 30 Jul 1857 vol 147 c. 743.

<sup>99</sup> See, e.g., divorce of the earl of Roseberry (1815: Hansard HL Debates 1<sup>st</sup> June 1815 vol. 31 c. 558; *Morning Chronicle*, 15<sup>th</sup> June, 1815; *Times*, 15<sup>th</sup> April, 9<sup>th</sup>, 19<sup>th</sup> May, 2<sup>nd</sup> June, 15<sup>th</sup> June 1815; George IV's attempt to divorce Queen Caroline (1820: W.D. Bowman, *The Divorce case of Queen Caroline* (London, 1930), K. Baker, *George IV: a Life in Caricature* (London, 2005), 166; TNA TS 11/115; Ellenborough divorce 1830: *Times*, 18<sup>th</sup>, 24<sup>th</sup>, March, 1<sup>st</sup> 2<sup>nd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, April, 1830; 'Curious case of divorce', *Bell's Life in London and Sporting Chronicle*, 17<sup>th</sup> February, 1833; Talbot divorce (1856) *Times*, 29<sup>th</sup> Feb 1856, 13<sup>th</sup> March, 23<sup>rd</sup> May, Cujus pseud. Mary Anne Talbot, *Divorce in 1857: the Talbot Case* (London, 1857); 'The Robinson Case', *The Englishwoman's Review and Home Newspaper*, 27<sup>th</sup> November, 1858, 311; *Codrington v Codrington and Anderson* (1864), 3 Sw. and Tr 368, 496, 4 Sw. and Tr. 63 164 ER 1317, 1367, 1439 (January-April 1864). *Times*, 21<sup>st</sup> November 1864, 11.; M. Vicinus, 'Lesbian perversity and Victorian marriage: the Codrington divorce case 1864', *Journal of British Studies* 36 (1997) 70-98; G. Savage, 'Erotic stories and public decency: newspaper reporting of divorce proceedings in England', *Historical Journal* 41 (1998) 511-28.

<sup>100</sup> S. Cretney, *Family Law in the Twentieth Century, A History* (Oxford, 2003), 393, 405, 407-8.

There were, however, limits to what courts felt that they could do. In particular, they would not use c.34 to cover jointures as well as dower,<sup>101</sup> though some judges regretted that they were unable to increase the scope of c.34 in this way. In *Goldsmid v Heathcote* (1864),<sup>102</sup> the claimant was found to have eloped from her husband with an army officer, but there had been no divorce. After the husband died, trustees objected to paying her under the marriage settlements. It was argued that the situation was analogous to Westminster II c. 34, but the Vice Chancellor, with much regret and moralising at the impropriety of her conduct, declared that she was entitled under the settlements, as they did not bar her in the event of adultery or elopement. Such judges found themselves caught between a desire to be more interventionist against adulteresses and a disinclination to upset private agreements.

### Deference to Coke

In *Woodward*: Byles J stated (at 642):

[M]y acquiescence in the judgment of the court reposes on the deference one is always bound to pay to the opinions of that very eminent lawyer, Lord Coke.

This passage is but a more open expression of a practice which seems to have become prevalent in the period, in many legal writers, and particularly in judges:

unquestioning reliance on Coke as an authority.<sup>103</sup> There was a clear disinclination to

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<sup>101</sup> See above, note 42. Note also that a leading civilian refused to allow a wife's adultery to upset her claim to a distributive share of personal property. *Legal Examiner and Law Chronicle* vol 3, 65-84 (1834).

<sup>102</sup> *Morning Post* 25<sup>th</sup> July, 1864; *Times*, 23<sup>rd</sup> July, 1864.

<sup>103</sup> On the rising of Coke's stock in the nineteenth century, see, e.g., Musson, 'Sir Edward Coke', 95.; J.F. Stephen, *A History of the Criminal Law of England* 3 vols, (New York, 1883) II, 205; D. Powell, 'Coke in context: early modern legal observation and Sir Edward Coke's reports', *Journal of Legal History* 21 (2000), 33-53; 45, 48. Coke relied upon in, e.g., J.J. Park, *A Treatise on the Law of Dower* (Philadelphia, 1836), 102; W. Cruise, *A Digest of the Laws of England Respecting Real Property* vol. 1 (London, 1835), 175.

go behind Coke and examine older legal sources,<sup>104</sup> or to look again at the statute itself and consider its proper interpretation.<sup>105</sup> Williams J implied that the anti-literalist position might be wrong, but did not feel able to disagree with Coke.<sup>106</sup> Whether this was indicative of a lack of scholarly initiative amongst the judiciary of the period, or whether deference to Coke was a convenient justification for taking the harsher line on c.34 is not clear.<sup>107</sup>

### A particularly English rule?

As has been shown, the Coke/*Woodward* interpretation of c.34 was not the original line and does not seem to have been dominant until the nineteenth century. It might be added that it was not the interpretation which was always favoured in other jurisdictions which applied, adopted or adapted the elopement/adultery exception to actions of dower.<sup>108</sup> Canada, for example, had shown an inclination to ignore Coke's hard interpretation, though it was brought into line with it by the obligation to follow *Woodward*.<sup>109</sup> U.S. jurisdictions took a variety of approaches to this piece of English

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<sup>104</sup> Lack of interest in the older authorities is displayed in Park, *Treatise on the Law of Dower*, introduction, in which the author declares his intention not to go into the history of dower, since it is not needed for practice, and 'may be left to the investigation of erudite curiosity'.

<sup>105</sup> Some writers had continued to maintain the literalist position at least into the 1840s, A Bisset, *A Practical Treatise on the Law of Estates for Life* (London, 1843). See, however, Amos, *Legal Examiner and Law Chronicle* (1833) 1, 172; L. Shelford, *Practical Treatise of the Law of Marriage and Divorce* (London, 1841), which follow Coke.

<sup>106</sup> p. 64.

<sup>107</sup> Both the attitude of English courts to 'institutional writings' and the use of Coke's work in decisions inimical to the interests of women would be interesting areas for future research. Note, for example, that Coke was cited as high authority in *Bebb v. Law Society* [1914] 1 Ch 286, 294. A consideration of Coke's views and effects on women is largely absent from discussions of his work in relation to 'freedom': see Powell, 'Coke in context', 33-4.

<sup>108</sup> Note that there is a lack of evidence as to the interpretation of c.34 in Ireland, though the exception was certainly used (see *Elizabeth Lady Dowager Boyne v Frederick Hamilton* (1773) *Irish Morning Chronicle and London Advertiser* 28<sup>th</sup> August 1773 and *Lloyd's Evening Post* 4<sup>th</sup> October 1773; William Ball Wright, 'The Boyne peerage case: a forgotten story of the eighteenth century', *Genealogical Magazine* iv (1900-1) 392-7; 432-7; 497-500) and remained part of the law until its repeal in the Succession Act 1965, s. 11(2) and Sch. II.

<sup>109</sup> *Graham v Law* 6 U.C.C.P., 310; M.G. Cameron, *A Treatise on the Law of Dower* (Toronto, 1882), 62; *Woolsey v Finch* 20 U.C.C.P., 132; *Neff v Thompson* 20 U.C.C.P. 211.

statute law.<sup>110</sup> Although Coke's influence was important on both sides of the Atlantic,<sup>111</sup> his 'purposive' approach to s.34 on adulterous elopement was not approved in many U.S. cases. Frequently, though not always, both jurisdictions which adopted the Statute of Westminster II and those which replaced it with their own, similar, legislation took the words of c.34 or its equivalent in their natural, conjunctive sense, insisting that *willing* departure by the wife, as well as adultery, was necessary for the bar,<sup>112</sup> thus interpreting the law in a more 'widow-friendly' way than the English orthodoxy under *Hethrington*, *Woodward* and *Bostock*.<sup>113</sup> One likely underlying reason for the difference is the greater pressure on landed resources in settled and increasingly crowded England, in comparison with the expanding and more sparsely populated U.S.A. and Canada.<sup>114</sup>

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<sup>110</sup> See, e.g., F.G. McKean, 'British statutes in American jurisdictions'. *University of Pennsylvania Law Review* 78 (1929-30), 195-230, 198; *Lakin v Lakin* 2 Allen (Mass.) 45, (1861).

<sup>111</sup> See R.S.D. Roper, *Law of Property Between Husband and Wife* (Buffalo, NY, 1820) 548; C.H. Scribner, *A Treatise on the Law of Dower* (Philadelphia, 1867), 2 vols. 498.

<sup>112</sup> See, e.g. *Reynolds v Reynolds* 24 Wendell (NY) 193, *Beaty v Richardson* 56 SC 173, 34 SE 73; 46 LRA 517, *Jarnigan v Jarnigan* 12 Lea (Tenn.) 292; *Reel v Elder* 62 Pa 308; *Walters v Jordan* 35 NC 361 57 Am Dec 558; 13 Ired. 361; *Shaffer v Richardson's administrator* 27 Ind. 122.; *Coggsell v Tibbets* 3 NH 41; *Heslop v Heslop* 62 Pa. St. 527; *Rawlins v Buttel* 1 Houst. (Del.) 224.; T.E. Atkinson, *Handbook of the Law of Wills* (St Paul, 1953), 149, E. P Hopkins, *Handbook on the Law of Real Property* (St Paul, 1896), p. 103 no. 60; C.T. Boone, *A Manual of the Law of Real Property* (San Francisco, 1883) p. 73.

<sup>113</sup> See, e.g., H. Turteltaub, 'Misconduct in the marital relation: adultery as a bar to dower', *University of Miami Law Review* 13 (1958), 83-91; *Lakin v Lakin* 84 Mass 45 (1861); *Davis v Davis* (1918) Wis. ; 167 NW 879. Some legislation essentially replicated the scheme of c. 34, while, elsewhere, divorce rather than elopement and/or adultery, became the barring event: J. Kent, *Commentaries on American Law* 4 vols (New York, 1826-30), IV, 52-3; *Reynolds v Reynolds* 24 Wend (NY) 193 (1840).

A deliberate move away from the *Hethrington* – *Woodward* line can be seen in the Connecticut law specifically giving dower to a woman who was absent from her husband 'by his consent or by his default' when he died: Scribner, *Treatise on the Law of Dower*, II, 502. Other formulations avoided the elopement question by simply saying that the bar applied if the wife committed adultery and was not living with the husband at the time of his death: *Phillips v Wiseman* 131 NC 402 42 SE 861 (1902).

One would expect, in different political and legal conditions, that property law would develop its own independent character, See, e.g. P. Girard, 'Rethinking 'the nation' in national legal history, a Canadian perspective', *LHR* 89 (2011), 607-26; C. Shammans, 'Reassessing the Married Women's Property Acts', *Journal of Women's History* 6 (1994), 9-30; M. Salmon, *Women and the Law of Property in Early America* (Chapel Hill NC, 1986); A.D. Morantz, 'There's no place like home: homestead exemptions and judicial constructions of family in nineteenth century America', *LHR* 24 (2006) 245-95.

<sup>114</sup> Also worthy of consideration are the different attitudes to equity in England and the American states, and the availability of alternative models of family provision which could be imitated by the newer jurisdictions, see Shammans, *op. cit.*

## Conclusion

Interpretation of the elopement/adultery exception under Statute of Westminster II c.34 had moved slowly over five centuries from a relatively ‘widow-friendly’ view, allowing those widows who had only settled down with another man after leaving the matrimonial home because of mistreatment by a husband or abduction to claim their dower, to a ‘widow-unfriendly’ view, allowing the heir or other tenant to oppose dower in such cases. The ‘widow-unfriendly’ interpretation triumphed only in the nineteenth century, when social, legal and policy factors combined to produce conditions receptive to an interpretation which misrepresented the apparent intention of the medieval legislator and the understanding of the legislation which prevailed into the early modern period,<sup>115</sup> preferring the ‘widow-unfriendly’ view of Coke.

The slow move and disagreement as to the correct interpretation of the law on dower gave rise to vagueness in the legal position of women such as will be familiar to those who have looked at the history of women’s rights with relation to corporal punishment by a husband, or to their non-judicial imprisonment, and which could be as detrimental to them as some of the clearer-cut rules of coverture and sex-based disqualification.<sup>116</sup>

The nineteenth century change in interpretation of c.34 contrasts with what might be seen as ‘pro-woman’ moves such as the tendency towards a focus on lack of

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<sup>115</sup> Westminster II c. 34 had not been a straightforwardly moralising piece of legislation, and was probably passed to deal with concerns of relatively large scale landowners that they should not be at risk of their land passing to women who had laid them open to public disgrace and dishonour by deserting them with (or for) a rival, while allowing them to reconcile with erring wives if dynastic circumstances (rather than the Church) dictated that course of action.

<sup>116</sup> See, e.g., M. Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (London, 1992); G. Seabourne, *Imprisoning Medieval Women: the non-judicial confinement and abduction of women in England c.1170-1509* (Farnham, 2011).

consent as opposed to force and resistance in the law of rape,<sup>117</sup> changes in divorce procedure and a decrease in the seriousness of conduct which qualified as ‘cruelty’ in the divorce context, allowing a slightly larger pool of women to escape miserable marriages, and an increase in the evidential requirements for proof of adultery,<sup>118</sup> preventing some men from divorcing their wives so easily as in the past., an increase in the likelihood of a divorced mother obtaining custody of young children,<sup>119</sup> and the matrimonial property acts.<sup>120</sup> With dower declining in importance, and never applicable to those couples who owned no real property, a change in the interpretation of c.34 might not have made a widespread difference to the lives of women in England and Wales, but it was indicative of opposition to women’s property rights and should be considered alongside the more familiar narrative of ‘progress’ in this area.<sup>121</sup> The adoption of a harsh interpretation of c.34 in the nineteenth century might be seen as a significant counter-current, stirred up by the legal establishment against the flow of property rights to women, or as a particular opposition to the adultery and lack of respectability of women of moderate means, of the sort who were likely to claim dower, and is thus worthy of consideration in discussions of both gender and class attitudes on the part of nineteenth century lawyers.

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<sup>117</sup> The apparent lowering of the standard for volition, in particular, may be contrasted with the slight nineteenth century moves towards a less complainant-unfriendly standard of consent in rape cases: see, e.g. K. Smith, ‘Criminal Law’ in W. Cornish et. al., *Oxford History of the Laws of England vol. XIII: 1820-1914 Fields of Development*, (Oxford, 2010), 1-464, 404, on the (slight) moves in the nineteenth century with regard to the concept of consent to sex in rape cases. Note, in particular, *R. v. Camplin* (1845) 1 Den 89 and *R. v. Fletcher* (1859) Bell 63, in which reference is made to the Westminster II c.34 ravishment provision. In this case, they were arguably incorrect, confusing the offence of rape with that of *raptus*: see Seabourne, *Imprisoning Medieval Women*, Appendix.

<sup>118</sup> L. Stone, *Broken Lives: separation and divorce in England 1550-1857* (Oxford, 1993), 10; Stone, *Road to Divorce*, 205.

<sup>119</sup> Custody of Infants Act 1839; Matrimonial Causes Act 1857.

<sup>120</sup> Matrimonial Causes Act 1857; Married Women’s Property Act 1870; Matrimonial Causes Act 1878; Married Women’s Property Act 1882; Married Women’s Property Act 1893; M.L. Stanley, ‘One must ride behind’ married women’s rights and the Divorce Act of 1857’, *Victorian Studies*, 25 (1981-2) 364-5; L. Holcombe, *Wives and Property* (Oxford, 1983); V. Ulrich, ‘The reform of married women’s property law in England during the nineteenth century’ *Victoria University of Wellington Law Review* (1977)13-36.

The possibility of claiming dower was removed in 1925, as dower in the case of intestacy was replaced by new modes of provision for widows (and other family members), modelled on the rules for distribution of personal property, and with no possibility of exception on grounds of adultery or elopement. Some movement in this direction had already taken place in the Intestate Estates Act 1890.<sup>122</sup> Adultery and/or desertion was now only relevant to provision for those who had been married to a man who predeceased them in so far as they had been grounds for a successful and completed divorce during his life. Widows' entitlements were no longer subject to the possibility of a court's judgment on their sexual propriety during the course of a marriage and there need be no further debate about the importance of a conjunction in a thirteenth-century statute.

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<sup>121</sup> It could also be contrasted with the 'silent decriminalisation' of adultery noted by Stone: Stone, *Road to Divorce*, 232, a development which he dates to the early eighteenth century.

<sup>122</sup> J.H.C. Morris, 'Intestate succession to land in the conflict of laws', 85 *LQR* (1969) 339 – 49, 348; C.H. Sherrin and R.C. Bonehill, *The Law and Practice of Intestate Succession* 3<sup>rd</sup> edn, (London, 2004), 34.